This meeting was attended by only two directors namely Gan Hock Chwee and Wong Hieng Tock. It is clear that this resolution is void.

In my view these three actions were commenced without authority of the plaintiff company.

Now, the question arises as to what order I can make in view of my finding that these actions were brought without authority.

In *Daimler Co., Ltd.* v. *Continental Tyre & Rubber Co. Ltd.*,[5] the solicitors of the respondent company issued the writ upon the instruction of the secretary of the company. It was held by the House of Lords that the action was instituted without authority of the company and ought to be struck out as irregular. The appeal was allowed and the action was dismissed and there was no order as to costs. Lord Parker said (at p. 348):

"My Lords, I feel some little difficulty as to the precise form which your Lordships' order ought to take. The action is altogether irregular and should be struck out, all orders made therein being of course discharged. But there is no one before the House who can be made liable for costs or who can be ordered to replace in court the moneys paid out to the secretary. There can therefore be no order as to costs, and the appellants must be left to pursue any remedy they may have against the secretary personally in respect of the money which was erroneously paid to him".

Greer L.J. in *John Shaw & Sons (Salford), Ltd.* v. *Peter Shaw & John Shaw*,[6] said (at p. 131):

"In my opinion the court has inherent jurisdiction to say 'as it is clearly established that the action has been brought by solicitors who were not authorized by the named plaintiff to bring it, we will strike it out'. They would not then be entitled to award costs against the nominal plaintiff, nor would they as a rule make any order that the solicitor should pay the costs, but would leave these matters to be determined on a motion to which the solicitors would be parties".

Slesser L.J. in the same case said (at p. 145):

"But the rights of the court in its inherent jurisdiction to stay actions which would be an abuse of its process if they are not properly upon the record, either because the plaintiff was not existent at the time of the issue of the writ or because they are satisfied on the facts that he had not authorized the proceedings, has so far been undoubted, and this, altogether apart from the desire of either party, if the facts are before the court. Where the court may properly come to a conclusion on sufficient or admitted evidence that there is no action properly before it, it may well think it right to act in accordance with that inherent jurisdiction, to refuse to proceed, and the difference which has been sought to be found between the case where no retainer could be given at all, and the case where what is still in dispute is whether in fact there was or was not authority to give one is not a difference in principle, but a difference of expediency, depending upon whether a court is or is not so informed of the facts that it does or does not think it right to come to a conclusion on the matter as a question of law.

In the present case, as I have said, the facts which have been found by the learned judge are before the court; they show, to my mind, a complete absence of authority of the company to sue in this action. In other words, I have come to the conclusion that the company is not before the court at all, and that, therefore, for this reason, the appeal succeeds and the action must be struck out; but as there is no one who is before the court who can be made liable for costs, the appellants if they desire costs must pursue such other remedies in other proceedings on this head as they may think advisable".

This trial has proved to be abortive. In my opinion the proper order to make in this case is to strike out the three actions of the plaintiffs and the counterclaims of the defendants and make no order as to costs.

It would appear from the authorities that if the defendants had questioned the authority to sue by way of motion to strike out the name of the company as plaintiffs or to stay or dismiss these actions the defendants could have in the same motion asked for costs against Wong Hieng Tock, who was the person who commenced these unauthorised actions, and against the solicitors who act for the company without authority of the company and the court could have ordered them to pay the costs. But the defendants did not proceed in that manner and the position now in that Wong Hieng Tock and the solicitors acting for the company are not parties to these proceedings and they cannot be ordered to pay the costs. The defendants if they desire costs must, I am afraid, decide what further action to take in the matter.

The three actions of the plaintiffs and the counterclaims of the defendants are struck out and there is no order as to costs.

Actions and counterclaims struck out.

Solicitors: *J. Tan Chor-Yong & Co.; Pillai & Co.*

GOH GOK HOON v. ABDUL HAMID & ANOR.

[A.C.J. (Ismail Khan J.) July 27, 1966]

[Malacca — Civil Appeal No. 1 of 1962]

Landlord and Tenant — Prohibition against subletting — Subletting of premises — Agreement for subletting — No parole evidence to vary terms of agreement — Evidence Ordinance, 1950, s. 92 — Control of Rent Ordinance, 1956, s. 12(1).

This was an appeal against the decision of the learned president, sessions court, Malacca, who had dismissed the appellant's claim for possession. The appellant claimed possession on the grounds that the first respondent was in breach of a prohibition in the tenancy agreement against subletting, that neither the first respondent nor any member of his family was in possession of the premises and that having sublet the premises to the second respondent he was receiving in respect of such subletting rents which exceeded more than 10% the rent of the whole of the premises. The learned president held that the evidence was too meagre to prove "beyond reasonable doubt" that neither the first respondent nor any member of his family was in occupation of the premises and he held there had been no subletting

but only a licence granted by the first respondent to the second respondent.

Held: (1) the agreement between the first and second respondents coupled with the fact that the second respondent was given exclusive possession of the premises showed that the second respondent was a tenant and not a licensee and therefore there had been a breach of the prohibition against subletting;

(2) on the evidence the first respondent did not have any right to retain any portion of the premises for his own occupation and he was in fact receiving out of the tenancy a sum equal to more than four times the amount of rent received by the landlord;

(3) therefore the appeal must be allowed and the respondents be ordered to deliver vacant possession of the premises to the appellant.

Cases referred to:—

(1) *Robins* v. *National Trust Co. Ltd.* [1927] A.C. 515, 520.

(2) *Arunachalam Chettiar* v. *How Guan* [1963] M.L.J. 253, 254.

(3) *Errington* v. *Errington* [1952] 1 All E.R. 155.

(4) *Addiscombe Garden Estates* v. *Crabbe* [1957] 3 All E.R. 563, 571.

CIVIL APPEAL.

R. H. V. Rintoul, for the appellant.

Khoon Eng Chin for the first respondent.

F. Keith Seller for the second respondent.

Cur. Adv. Vult.

Ismail Khan J.: The appellant is the landlord of premises No. 2, Wolferstan Road, Malacca. Her claim for repossession of the said premises having been dismissed by the learned president of the sessions court, Malacca, she now appeals against that decision.

When the appellant became owner by purchase of the said premises in 1948, the first respondent had already been a tenant for some years carrying on there the business of an eating shop under the name of "K. Abdul Hamid Restaurant". His tenancy was protected by the Control of Rent Ordinance, 1956. In February, 1961, the appellant's rent collector saw this name changed from that of a Muslim into a Hindu eating shop. "Letchumi Vilas Restaurant". He informed his employer and on 29th March, 1961, the appellant's solicitors gave notice in writing to the first respondent terminating the tenancy on 30th April, 1961. The second respondent, as a person in possession, was also served with a copy of the notice.

Upon their refusal to vacate, the appellant commenced action on 30th May, 1961, against both the respondents on three grounds: first, that neither the first respondent nor any member of his family was personally in occupation of the premises or any part thereof; secondly, that having sublet the premises to the second respondent he was receiving in respect of such subletting rents which exceeded by more than 10 per cent the rent of the whole premises; thirdly, that the first respondent was in breach of a prohibition in the tenancy agreement against subletting.

These are grounds entitling a landlord to recovery of possession by virtue of paragraphs (i), (j) and (b) of section 12(1) of the Ordinance.

Each respondent filed his defence separately, but to the same effect, raising four points: (1) that the first respondent was still in "physical possession" of a portion of the premises and at the same time "in occupation of the whole of the said premises" through his said business, that is, the "K. Abdul Hamid Restaurant"; (2) that the first respondent was entitled to remain as statutory tenant; (3) that the second respondent was "only a lessee of the said business, but not of the premises" under an agreement dated 12th October, 1960, for a period of 5 years; and (4) that the prohibition against subletting was denied.

At the trial the appellant gave only formal evidence of ownership. For her case she relied mainly on her rent collector who spoke of the substitution of the business name and also of two long absences of the first respondent in India during 1948 and 1958 - 60 (when rents were paid by others acting on his behalf) but this witness, with regard to the arguments supporting a claim under paragraph (i) of section 12(1), was unable of his own knowledge to say that the first respondent had not been living on the top floor since 1948. Notwithstanding the paucity of evidence called on behalf of the appellant, there were nevertheless documents, admissions by the respondents and facts not in dispute, all of which afforded abundant, or at least sufficient, primary facts from which proper conclusions may be drawn upon the various questions in issue. The most important of such evidence was the so-called agreement of lease (D2) which is as follows:

"An agreement made this twelfth day of October one thousand nine hundred and sixty (1960) between K. Abdul Hamid of No. 2, Wolferstan Road, Malacca, merchant (hereinafter called the lessor) of the one part and P. P. Natesan of No. 2A Kampong Pantei, Malacca, merchant (hereinafter called the lessee) of the other part.

Whereas the lessor has been carrying on a restaurant business at No. 2, Wolferstan Road, Malacca, under the name and style of 'K. Abdul Hamid Restaurant' for many years and has agreed to lease out the said business furniture and fittings and utensils as specified in the schedule hereto to the lessee upon the following terms.

Whereby it is agreed as follows:—

1. The period of the lease shall be for a period of five (5) years beginning from the 6th dav of October, 1960.

2. The rent shall be the sum of dollars two hundred and fifty ($250) per mensem but such rent shall be paid yearly within seven (7) days before the commencement of each year.

3. The lessee shall pay to the lessor on the signing of this agreement the sum of dollars three thousand ($3,000) being the rent for one year in advance. The lessee by signing this agreement acknowledges receipt of same.

4. The business shall be carried on during the period under the business name of 'K. Abdul Hamid Restaurant' and no changes in the name or any other board shall be put up. Licence to carry on the business shall be obtained in the name of the lessor.

5. The lessee shall not assign or sublease the business to any other person or persons without the consent of the lessor nor shall the lessee carry on any other business other than restaurant business.

6. The lessee shall not sublet the premises to any other person or persons.

7. All profits and losses shall be the lessee's and the lessor shall not be responsible for any loss in the said business.

8. The lessor shall not interfere with the business during the period of five (5) years but if so interferes so as to become a nuisance to the lessee then the lessor shall be liable for such damages as the lessee may suffer.

9. The rent of the premises shall be paid to the landlord by the lessee on the 7th day of each month in the name under which the rent receipt is now issued.

10. The rent shall be paid annually by the lessee to the lessor either in Malacca or forwarded to the lessor at his request to India if he happens to reside there.

11. In case the landlord takes possession of the premises by legal pocess for the non-payment of the rent by the lessee or if the goods and furniture, etc. are attached and levied by any creditor of the lessee and for any alterations and additions made by putting any other name board then the lessee shall pay to the lessor the sum of dollars thirty thousand ($30,000) as liquidated damages.

12. The business together with all utensils, furniture and fittings as mentioned in the schedule hereto after making good for breakages shall be handed to the lessor at the end of the period of the lease of five (5) years.

13. The lessee shall pay all licence fees, municipal rates, charges, provident fund and all government dues.

14. All liabilities up to this date shall be paid by the lessor and all future liabilities shall be borne by the lessee during the period of five (5) years.

15. In case of the death of the lessor during the period of the lease the business shall only be handed to the legal representative of the lessor after the period of the lease and such legal representative cannot demand for any accounts of the business except the rent due under the lease.

16. In case the lessee desires to give up the business within the period of one (1) year then he shall give six (6) months' notice to the lessor.

17. In case the lessee makes default in payment of the rent and such default continues for a month then the lessor shall be entitled to take possession of the premises without notice and claims for damages.

18. In case of the above the lessee shall pay all rents due up to the date and pay a sum of dollars three thousand ($3,000) as liquidated damages.

19. If during the period of five (5) years the lessee is not able to send the rent to India owing to government restrictions then the lessee shall deposit sums due in any local bank in the name of the lessor.

20. If after the period of the lease the lessor or his agent does not take over the business within a month of the expiry of the period of five (5) years then the lessee shall continue to carry on the said business if he so desires on the same terms or hand over the business to the official assignee or any other government officials.

21. All disputes shall be settled by arbitration in accordance with the Arbitration Ordinance.

In witness whereof the parties hereto have hereunto set their hands the days and year first above written.

Signed and delivered by the said K. Abdul Hamid in the presence of:—) Sd. K. Abdul Hamid

Sd. S. Shunmugam

Signed and delivered by the said P. P. Natesan) in the presence of:—) Sd. P. P. ? (in Tamil)

Sd. S. Shunmugam

S. SHUNMUGAM
Advocate & Solicitor
MALACCA.

We, the undersigned hereby guarantee the due performance of the terms and conditions of this agreement by the lessee.

Dated this 12th day of October, 1960.

Sd. V. Muthiah
Sd. S. P. ? (Tamil)
Sd. in Tamil.

Witness:—

Sd. S. Shunmugam
Advocate & Solicitor
MALACCA.
12/10/60. "

The learned president considered the evidence of the rent collector too meagre "to prove beyond reasonable doubt that neither the first respondent nor any member of his family was not in occupation of the said premises or any part thereof"; the claim under paragraph (i) of section 12(1) therefore "must necessarily fail and be dismissed". With respect, the standard of proof required was clearly wrong, as this was not a criminal prosecution; moreover, the onus does shift at the various stages of a trial — see *Robins* v. *National Trust Co. Ltd.*,[1] *per* Lord Dunedin. However, I need not dwell any longer on the learned president's errors on this point. The reasons will be apparent later.

The learned president went on to discuss D2 in these words:—

"Having read the document exhibit D2 and the revocable power of attorney granted by the first defendant to the second defendant (vide exhibit D7 which was executed on the same day as exhibit D2) to enable the latter to manage and carry on the former's business of "K. Abdul Hamid Restaurant" at No. 2, Wolferstan Road, Malacca, and having heard the evidence of the defendants and their witnesses, especially that of D.W.3 on the *'animus revertendi'* of the first defendant, I was of the opinion and found that exhibit D2 did not create a sub-tenancy and that the second defendant was merely the first defendant's licencee".

Having, if I may say so, rather arbitrarily and without giving any reasons, held the agreement to be merely a licence, and having taken

into account the evidence of the solicitor who drew up the agreement to contradict the terms of this document contrary to section 92 of the Evidence Ordinance, the learned president rejected the ground afforded by paragraph (j) of section 12(1) for repossession. Having held that there was no subletting, he naturally said nothing whatever about paragraph (b) as to the breach of the prohibition against subletting. Accordingly, the appellant's claim was dismissed, the parties being ordered to pay their own costs.

An appeal is by way of rehearing. Since no question arose in the court below as to the credibility of the witnesses on each side, and the issues had to be determined on the undisputed facts and documentary evidence, I shall now proceed to deal with each ground of claim in alphabetical order.

First, under paragraph (b) the statutory restrictions on the landlord's right to possession are lifted "where an obligation of the tenancy other than the payment of rent has been broken". The appellant alleged a prohibition against subletting which obligation was broken by a subletting of the premises by the first respondent to the second respondent. I shall have to consider this ground *de novo* since nothing had been said about it by the learned president.

In their defence the prohibition was denied, but after the rent receipts were produced in evidence by the appellant, the respondents' case underwent a subtle change. At the head of each receipt appears the following inscription:—

"N.B. No sub-tenancy or change of tenancy will be allowed or recognised without the written consent of the landlord to this effect".

This condition of the tenancy was known to the tenant. The first respondent admitted it when he said "The landlord has printed on the rent receipt that there should be no subletting". Cross-examined by Mr. Keith Sellar, counsel of his co-defendant, the second respondent, he said "Yes, rent receipts do not prohibit the subletting of a part or parts of the premises". He had been tenant since, 1941, and he had been consulting the same advocate and solicitor regarding the matter of his tenancy for over ten years — see evidence of D.W.3. Both respondents strongly denied any subletting of the premises. At all events, counsel for each respondent contended that the subletting of a part, not of the whole, of the premises was not prohibited. I quote Mr. Keith Sellar's argument as recorded by the learned president:—

"Mr. Sellar submits no proof of terms of tenancy between plaintiff and first defendant which prohibits subletting. Only evidence is first defendant's admission that there was (no?) prohibition against subletting part or parts of the premises".

If the tenant was not subject to the obligation expressed plainly on each rent receipt, why was it necessary to persist so strenuously and so long in denying a subletting which the tenant had every right openly to do? The first respondent's own conduct over the years, especially since 1948, could have been consistent only with a landlord-tenant relationship which the tenant knew imported a condition against subletting. The three agreements of 15th July, 1948, 16th October, 1958, and 12th October, 1960, in my view, were clearly devices to conceal a subletting. I should observe that the last two documents were alike verbatim except as to the name of the so-called lessee. Having had legal advice since 1948, was there any plausible reason for the tenant resorting to the subterfuge of trying to cloak a transaction under false colours when he should have known that he could sublet openly? "The Control of Rent Ordinance is not a code setting out the whole of the law relating to landlord and tenant. It is an enactment which for the protection of the tenants places certain restrictions on the exercise by landlords of the rights which they possess under the general law of the land and though it modifies those rights in certain respects, it only does so within the limits of its own terms". (See *Arunachalam Chettiar* v. *How Guan* [2]).

There was thus complete freedom of contract except where statutory limitations had been imposed. The appellant's predecessor in title was her own father-in-law. Hence a reasonable presumption in the circumstances should be that she continued to rent the premises on the same terms and continued using the same forms of receipt as he did. Equally reasonable is the inference, fortified by the respondents' own conduct, that, after the appellant became the landlord, there was a fresh parole tenancy agreement between the first respondent and the appellant. Either way, on the balance of probabilities, I have little doubt that there was a prohibition against subletting which the tenant accepted as an obligation of his tenancy. Accordingly, the important question for determination in this case is whether or not the transaction between the respondents was in truth a subletting of the premises under colour of a lease of the business carried on there.

The terms of their contract had been reduced to writing drawn formally by a solicitor. Section 92 of the Evidence Ordinance, which the learned president should have remembered, excludes all parole evidence for the purpose of contradicting, varying, adding to or subtracting from its terms. It is a cardinal rule in the interpretation of documents that the intention of the parties must be gathered from the written instrument itself.

"The function of the court is to ascertain what the parties meant by the words which they have used; to declare the meaning of what is written in the instrument,

not of what was intended to have been written; to give effect to the intention as expressed, the expressed meaning being for the purpose of the interpretation equivalent to the intention. It is not permissible to guess at the intention of the parties and substitute the presumed for the expressed intention" — see *Halsbury*, vol. 11, 3rd edn., p. 382.

In D2 the recital, referring to "the restaurant business at No. 2, Wolferstan Road", coupled the business together with the premises. Clause 6 then stipulated that "the lessee shall not sublet the premises"; hence it raises the question, "if he was not a sub-tenant, having an interest as such in the premises, why prohibit him from doing what was beyond his powers"? Clause 9 imposed on the lessee an obligation to pay the rent of the premises to the landlord, and clause 17 enabled the lessor "to take possession of the premises" for non-payment of rent. This necessarily implied that the lessee was entitled to undisturbed possession of the premises, to the exculsion of the lessor, so long as rent continued to be paid. Exclusive possession, especially in the circumstances of this case, was not merely a hall-mark of a tenancy, but it was also in my opinion clear proof that the person having such possession was legally a tenant and not a licensee — see *Errington* v. *Errington;* [3] *Addiscombe Garden Estates Ltd.* v. *Crabbe.*[4]

In this connection there are some further observations I wish to make. First, the agreement made no reservation whatever for the first respondent having any right to retain any portion of the premises for his own occupation. If he was allowed access to any portion of the premises he did so only by leave and licence of the second respondent, notwithstanding what any witness might have said to the contrary. Secondly, I cannot understand how the business could be severable from the premises. The very fact that the ingenuity of an experienced advocate and solicitor has not proved successful in separating the business from the premises as two distinct entities demonstrates that the lease of the business necessarily included the premises in which the business was carried on. Thirdly, the leased business was no longer the first respondent's own after it was taken over, hence he was not on that account, as he claimed, in occupation of the premises. The employees therein were servants of the second respondent who paid out of his own pocket contributions to the employees provident fund. Fourthly, the power of attorney was a sham because the business to be carried on was, during the period of the lease, not that of the donor who was responsible neither for the losses nor entitled to any profits therefrom. It was merely an instrument to enable the second respondent to obtain renewals of the refreshment room licence in the name of the first respondent. Finally, the few sticks of furniture in the unprepossessing eating shop (of which a list appear on page 72 of the record) were clearly not worth in capital value even half a year's rent. The photographs in evidence speak for themselves. No fine calculation is needed to prove that in collecting $250 per month for nothing — since the monthly rent of the premises was also paid by the second respondent — the first respondent as tenant was making a handsome profit out of the tenancy equal to more than four times the amount of the rent received by the landlord.

I would for the reasons above stated hold that the appellant succeeds on all grounds against the first respondent and, because of the prohibition against subletting, she is entitled to an order for possession against the second respondent as well, since he is not protected by the provisions of section 19 of the Ordinance.

I accordingly allow this appeal and order that the respondents deliver up vacant possession within sixty days of the order. They are to pay up all rents accrued or to accrue until the date of surrender of possession, and double rent after the sixtieth day in the event of their holding on until execution. As to costs, the conduct of the respondents justifies an order that they pay the costs of the action and the appeal.

Appeal allowed.

Solicitors: *Shearn Delamore & Co.; Khoo Eng Chin; Sault, Keith Sellar & Co.*

PUBLIC PROSECUTOR v. ONG KENG SEONG

[A.Cr.J. (Ali J.) July 31, 1966]

[Ipoh — Criminal Revision No. 4 of 1966]

Criminal Law and Procedure — Forfeiture of motor vehicle used as a public service vehicle without a licence — Motor vehicle bought on hire-purchase by registered owner — Whether hirers entitled to be heard — Meaning of "owner" — Road Traffic Ordinance, 1958, ss. 2, 74(1) and 92.

This was an application to revise an order of forfeiture of a motor vehicle which had been found to be used as a public service vehicle with the knowledge of the registered owner. The vehicle was held under a hire-purchase agreement and it was contended on behalf of the finance company that the company as legal owners of the motor vehicle should have been given an opportunity to be heard.

Held: (1) in view of the definition of "owner" as the registered owner of the vehicle in the Road Traffic Ordinance, it was unnecessary for the court to inquire whether there was a hire-purchase agreement in relation to the vehicle;

(2) the fact that the registered owner had knowledge of the car being used for the commission of the offence was sufficient to justify the exercise of the discretionary power of forfeiture.

Case referred to:—

(1) *Kiaw Aik Hang Company Ltd.* v. *Public Prosecutor* [1962] M.L.J. 276.